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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 VAXIION THERAPEUTICS, INC.,

11 Plaintiff,

12 vs.

13 FOLEY & LARDNER LLP and DOES 1
14 through 20, inclusive,

15 Defendants.

CASE NO. 07cv00280-IEG (RBB)

**ORDER DENYING DEFENDANT'S
MOTION TO STRIKE
SUPPLEMENTAL EXPERT REPORTS
OF LOUIS S. BERNEMAN AND
MICHAEL J. LASINSKI AND
REQUEST FOR SANCTIONS [Doc. No.
164]**

16 Defendant Foley and Lardner ("Foley") moves the Court to strike the supplemental reports of
17 plaintiff Vaxiion Therapeutics' ("Vaxiion") experts Louis S. Berneman and Michael J. Lasinski.
18 Defendant additionally requests the Court impose sanctions upon plaintiff sufficient to pay Foley's
19 costs in bringing the instant motion.

20 Defendant's motion does not indicate the part of the record from which it desires the Court to
21 strike the expert reports; instead it appears defendant is using the motion to strike as a vehicle to
22 generally preclude plaintiff from using the reports. Defendant's motion is based on grounds that the
23 contested expert reports rely on a term sheet that arose from confidential settlement discussions and
24 whose use was prohibited by protective order. Foley additionally argues the reports are untimely
25 under the established case management schedule, and the experts' use of the term sheet is precluded
26 by Fed. R. Evid. 408.


27 Fed. R. Civ. P. 26(a) (2008) sets out the requirements for disclosure of expert testimony during
28 the discovery process, and Fed. R. Civ. P. 37 (2008) sets out the consequences for failure to provide

1 proper and timely disclosures. Notwithstanding these provisions, a generalized motion to strike is
2 not appropriate here. Although Foley cites no procedural authority for its motion, Foley presumably
3 brings the motion under Fed. R. Civ. P. 12(f). Rule 12(f) provides that “[t]he court may strike from
4 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
5 Fed. R. Civ. P. 12(f) (2008). Fed. R. Civ. P. 7(a) enumerates what is considered a “pleading” in a
6 lawsuit: “(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated
7 as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a
8 third-party complaint; and (7) if the court orders one, a reply to an answer.” Fed. R. Civ. P. 7(a)
9 (2008). Thus, by the plain text of the federal rules, defendant may not bring a motion under Rule 12(f)
10 because the instant motion is not related to a pleading.

11 Moreover, the Ninth Circuit has adopted a strict reading of the applicability of a Rule 12(f)
12 motion. In Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880 (9th Cir. 1983), the appellant
13 challenged a trial court's striking of its motion to reconsider the Court's order granting summary
14 judgment. The court held striking the motion was improper, in part because “only pleadings are
15 subject to motions to strike.” Sidney-Vinstein, 697 F.2d at 885. Despite Rule 12(f)’s limited
16 applicability, courts do have discretion to strike inadmissible evidence filed in support of a summary
17 judgment motion. Bliesner v. Commun. Workers of Am., 464 F.3d 910, 915 (9th Cir. 2006) (holding
18 a district court did not abuse its discretion when it struck part of an affidavit supporting a motion for
19 summary judgment). Foley does not indicate in its motion that either report is related to any pleading
20 or motion presently pending before the Court. Accordingly, the Court DENIES defendant’s motion
21 to strike and request for sanctions.

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23 **IT IS SO ORDERED.**

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25 **DATED: December 11, 2008**

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27 **IRMA E. GONZALEZ, Chief Judge**
28 **United States District Court**